



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

May 15, 2015
OM 15-06

Mr. Felix Appolonia

Re: Appolonia v. West Warwick Board of Canvassers

Dear Mr. Appolonia:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the West Warwick Board of Canvassers (“Board”) is complete. By email correspondence dated October 30, 2014, you alleged the Board violated the OMA during its October 27, 2014 meeting when it discussed an item not listed on the agenda. More specifically, you allege the Board discussed and voted on procedures regarding poll worker contact, yet that item was not listed on the agenda. By email correspondence dated November 13, 2014, you additionally alleged the Board violated the OMA during its November 4, 2014 meeting when it continued its discussions about poll worker contact and your complaint regarding this issue, yet that item was again not listed on the agenda.

In response to your complaint, we received a substantive response from the Board’s legal counsel, Timothy A. Williamson, Esquire. We also received a response from the Chairman of the Board, Raymond E. Lambert. Attorney Williamson states, in pertinent part:

“[i]n response to both Mr. Appolonia’s complaint and amended complaint regarding the October 27, 2014 and November 4, 2014 [meetings], the question must be posed * * * ‘how specific does an agenda for a public meeting of the [Board] have to be in order to comply with the Open Meetings Law?’ Especially during an election year and when the discussion is about an administrative function of the Board’s Clerk.

The [Board], an appointed body, exercises its limited authority over local elections; voting lists, and complying with state law as promulgated by the General Assembly and the rules and regulations as promulgated by the RI Board of Elections and RI Secretary of State. Clearly there are times, during the public

session of the meetings when discussion is held about questions that are posed to the Board.

Clearly a topic discussed in general discussion should avoid any pertinent information or issue that would be deemed public or have any effect on the election process or the results of a particular election.

While it is true that the subject matter of the poll workers and the contacting of poll workers was not listed as an agenda item for the [Board's] meetings, the Board's intent on listening to Chairman Florio and its direction to the clerk regarding same cannot be considered in violation of the Open Meetings Act.

There was no intent to mislead the general public of Mr. Appolonia regarding this discussion of an administrative performance of the Board of Canvasser's Clerk."

Mr. Lambert states, in pertinent part:

"On Monday, October 27, 2014 at 3:00 P.M. the [Board] met in Public Session. *
* *

Under general discussion the Chairman of the Republican Town Committee, [Mr.] Joseph Florio raised an issue of concern to the Republican party, namely the acquisition/recruitment of poll workers for the general election. (Emphasis in original).

Mr. Florio stated that the Republican party had acquired/recruited their complete allotment of poll workers for the general election but that the Democratic party had not done so and that the Board of Canvassers clerk had to acquire/recruit poll workers for them. (Emphasis in original).

I inquired of our clerk if indeed this was factual to which she replied yes she had done so.

Mr. Florio expressed his feeling that this was not fair and equal and the Board concurred.

The Vice-Chairperson, [Ms.] Nancy Leblanc, made a motion to send Mr. Appolonia a letter/e-mail/notice that in the future the Board clerk would no longer acquire/recruit Democratic poll workers. (Emphases in original).

* * *

[A]ll poll workers, both democratic and republican, were already in place and appointed by the Board at this time. This motion by the Board was for future general elections, approximately two (2) years from then.

* * *

Mr. Appolonia did appear before the Board at its November [4], 2014 meeting and never raised the issue. In fact he spent a good deal of time questioning voter ID procedures when registering to vote. * * *

Mr. Appolonia asserts that the Board allowed discussion about procedure and the item was not properly on the agenda, when in fact the Board was informed that the RI Election Laws were not properly followed or adhered to. * * *

In his amended complaint, Mr. Appolonia alleges that the Board told its clerk to notify Mr. Appolonia that it would no longer contact poll workers in the future when in fact the Board advised its clerk to notify Mr. Appolonia that the clerk would no longer obtain/acquire/recruit poll workers for the Democratic party. This is not the function of the Board or its clerk. Of course the clerk would continue to contact poll workers, once appointed by the Board, which is the function of the Board and its clerk.

Finally, in his amended complaint, Mr. Appolonia states that the Board again discussed this issue ‘poll worker contact.’ In actuality the Board asked its clerk if she had notified Mr. Appolonia of the Board’s decision regarding poll worker acquisition/recruitment. She advised the Board she did and offered him the opportunity to respond. I again advised the Board about the law in this matter and what I believed to be the nuts and bolts of the situation. No action or vote was taken at said meeting.” (Emphases in original).

We acknowledge your rebuttal dated December 16, 2014 and your additional response dated February 16, 2015.

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Board violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

The OMA was enacted by the General Assembly because “[i]t is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy.” R.I. Gen. Laws § 42-46-1. In order for the OMA to apply, a “quorum” of a “public body” must convene for a “meeting” as these terms are defined by the OMA. See Fischer v. Zoning Board of the Town of Charlestown, 723 A.2d 294 (R.I. 1999). A “quorum” is defined as “a simple majority of the membership of a public body.” R.I. Gen. Laws § 42-46-2(d). For purposes of the OMA, a “meeting” is defined as “the

convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” R.I. Gen. Laws § 42-46-2(a). See Zarella et al. v. East Greenwich Town Planning Board, OM 03-02. All three of these elements (a quorum, meeting, and public body) must be present in order for the OMA to apply; the OMA is not applicable when one or more of these elements is absent. Id.

Here, it is undisputed that the entire Board met at an advertised meeting. The issue for this Department to resolve is whether the Board discussed and/or acted upon a matter over which the public body has supervision, control, jurisdiction, or advisory power, yet that matter was not properly advertised. It appears, based upon the evidence presented, that you are a member of the Town’s Democratic Party. During the Board’s October 27, 2014 meeting, under the agenda item “General Discussion,” the Board began a rather lengthy discussion on poll worker contact. The Board decided, through a motion and a vote, to send you a correspondence indicating that the clerk of the Board would not be contacting poll workers for either the Democratic or Republican Party - it was the responsibility of both the Democratic and Republican Parties to contact their respective poll workers.

Even though Attorney Williamson indicated that the action was “administrative,” the evidence reveals that the Board determined the matter through a motion and vote. A motion was made by the Vice-Chairperson to send you a “letter/e-mail/notice” that in the future the Board clerk would no longer acquire or recruit Democratic poll workers, yet that item was not advertised. While the Board could lawfully discuss a matter initiated by a member of the public during a public forum as suggested by Mr. Lambert, absent an emergency, the Board could not lawfully take action upon the matter raised in the public forum. See R.I. Gen. Laws § 42-46-6(d) (“Nothing within this chapter shall prohibit any public body, or members thereof, from responding to comments initiated by a member of the public during a properly noticed open forum even if the subject matter of a citizen’s comments or discussions were not previously posted, provided such matters shall be for informational purposes only and may not be voted on except where necessary to address an unexpected occurrence that requires immediate action to protect the public or to refer the matter to an appropriate committee or to another body or official.”) In his amended response, Attorney Williamson states that “the motion was to direct the clerk to forward a letter to Mr. Appolonia to inform him that by order of the Board of Canvassers; the Clerk will no longer call poll workers from the list provided by the chairmen.” (Emphasis added). As such, this Department concludes that the Board violated the OMA when it took a vote at its October 27, 2014 meeting during the public forum portion of the meeting.

It appears that the discussion of poll worker contact continued at the November 4, 2014 meeting, under the agenda item entitled “General Discussion.” The Chairman of the Board, Mr. Raymond Lambert, initiated the discussion and three (3) individuals, including the Chairman of the Republican Party, were in attendance at Mr. Lambert’s request. Mr. Lambert referred to the Clerk of the Board who informed the Board that she sent an email to you regarding the fact that in the future she would not be contacting poll workers for either political party. It appears, based upon the audio recording of the meeting, that the three (3) individuals referenced supra received copies of this email. Pursuant to R.I. Gen. Laws § 42-46-6(d), “[n]othing within this chapter shall prohibit any public body, or the members thereof, from responding to comments initiated

by a member of the public during a properly noticed open forum even if the subject matter of a citizen's comments or discussion were not previously posted." (Emphasis added). Here, however, the evidence demonstrates that a member of the Board initiated the discussion of this matter that did not appear on the agenda and not a member of the public. As such, we conclude the Board violated the OMA when a member of the Board, and not a member of the public, initiated these non-agenda comments. Id. It appears no vote was taken at this meeting.

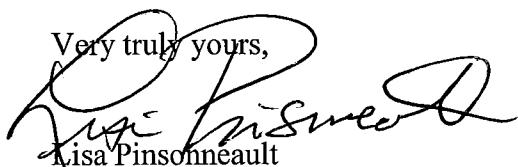
Upon a finding that a complaint brought pursuant to the OMA is meritorious, the Attorney General may initiate suit in the Superior Court. R.I. Gen. Laws § 42-46-8(a). There are two remedies available in suits filed under the OMA: (1) "[t]he court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of [the OMA];" or (2) "the court may impose a civil fine not exceeding five thousand dollars (\$5,000) against a public body or any of its members found to have committed a willful or knowing violation of [the OMA]." R.I. Gen. Laws § 42-46-8.

In the instant case, we find no evidence that the Board knowingly or willfully violated the OMA. While injunctive relief would be appropriate, we prefer to allow the Board the opportunity to remedy the violations on its own. See Tanner v. Town Council of the Town of East Greenwich, 880 A.2d 784, 802 (R.I. 2005) ("By scheduling, re-noticing, and re-voting on the challenged appointment, the town council, albeit belatedly, was acting in conformity with both the letter and spirit of the avowed purpose of the OMA – to ensure that 'public business be performed in an open and public manner.'"). It is this Department's understanding that the Board will voluntarily correct the violation cited in this finding. The Board will re-advertise and re-vote on the issue regarding notice to you that the Board clerk will no longer acquire or recruit Democratic poll workers. Because no action or vote was taken during the November 4, 2014 meeting, no remedial action is necessary. This finding shall serve as notice that future similar violations committed may be considered willful or knowing and this Department may seek civil penalties in Superior Court as authorized under law.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing an OMA complaint in the Superior Court. The complainant may do so within "ninety (90) days of the attorney general's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later." R.I. Gen. Laws § 42-46-8.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,



Lisa Pinsonneault
Special Assistant Attorney General
LP/pl

Cc: Timothy A. Williamson